

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RUTH BROWN et al.,
Grievants,**

v.

Docket No. 2018-0914-CONS

**DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
WELCH COMMUNITY HOSPITAL
Respondent.**

DISMISSAL ORDER

Grievants, Ruth Brown, Tammie Cleary, Sherri Kroger, and Deborah Burks, are medical personnel employed by Respondent, Department of Health and Human Resources (“DHHR”). They all filed grievances which were stamped as “received” by the Grievance Board on January 24, 2018.¹ The grievances forms are identical and allege:

Since the initiation of Kronos, I have not received the hourly pay that has been provided in the past for call time. My call time has been based on 20% of my hourly pay prior to Kronos, which has been approximately 11 years.² I was notified that this would be implemented and pay may be decreased.

As relief Grievant’s seek:

Back pay plus interest for all call hours for the employees that have been underpaid the 20%. Continued individual rates in the future to supplement the difference.

A level one hearing was scheduled for February 8, 2018. At that time, the four separate grievances were consolidated, and the parties agree to waive the level one

¹ The envelopes containing the grievance forms were postmarked January 23, 2018.

² This amount of time was listed in Ms. Brown’s statement. The other three listed 2 1/2, 11, and 12 years.

hearing. A mediation session is scheduled for May 23, 2018. On March 21, 2018, Respondent by counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General, filed a Motion to Dismiss. Grievants representative Gordon Simmons, UE Local 170, WVPWU,³ file a Response to the Motion on April 9, 2018. This matter is now mature for decision on the motion.

Synopsis

Respondent asserts that Grievants did not file their actions within fifteen days of being notified that the method for compensating them for being on-call changed from a percentage of salary to a flat rate. Grievants counter, *inter alia*, they are being subjected to salary disparity which constitutes a continuing violation allowing them to file a grievance within fifteen days of the most recent occurrence. All Hospital employees are now subject to the same fixed rate for on-call time. There is no disparity of pay. Rather, the grievable event was the conversion from percentage to fixed compensation. Respondent proved that Grievants did not file their claims within fifteen working days of that event.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in the pleadings.

Findings of Fact

1. Grievants, Ruth Brown, Tammie Cleary, Sherri Kroger, and Deborah Burks, are medical personnel employed by Respondent, Department of Health and Services. They all work at the Welch Community Hospital in McDowell County, West Virginia.

³ West Virginia Public Workers Union.

2. Grievants are regularly scheduled to remain on-call for the Hospital and available to report to work at short notice. Grievants have been traditionally compensated 20% of their normal hourly rate of pay when they are required to remain on-call.

3. On May 13, 2017, Krosos, a new computer-based payroll system, went on-line for salary and wage payments for all employees of DHHR, including Grievants.⁴

4. Prior to implementation of Kronos for DHHR, it was discovered that the software would not process the payment of on-call time as a percentage of the normal hourly rate. Consequently, a flat hourly rate of pay was established to compensate employees for all on-call time.

5. The change to a flat rate for on-call time commenced on May 13, 2017, and would have been reflected in Grievants' pay in June and July 2017.⁵

6. The grievances intended to contest this change were filed on January 24, 2018.

Discussion

“Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. Va. Code §6C-2-1, *et seq.*” W. VA. CODE ST. R. § 156-1-6.2.

Respondent asserts that the grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4 and therefore it must be dismissed. When an employer seeks dismissal of a grievance on the basis that it was not timely filed, the employer has the

⁴ Kronos was implemented to be a single payroll system for all West Virginia State employees and was implemented across all agencies.

⁵ As well as every month thereafter.

burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff'd*, Circuit Court of Kanawha County, No. 97-AA-110 (Jan. 21, 1999).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). See *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Respondent demonstrated that the action which is the basis of these consolidated grievances occurred on or about May 13, 2017, when the Kronos payroll system was implemented. Even if Grievants were not given prior notice that the compensation for on-call time would change with the implementation of Kronos, their paychecks reflected the change in their June and July payments. Grievants were unequivocally notified of the change at that time. Even in their grievance statements Grievants wrote, “*Since the initiation of Kronos*, I have not received the hourly pay that was provided in the past for my call time,” and “*I was notified that this would be implemented* and pay may be decreased.” (Emphasis added). These statements indicated that Grievants have been aware of the pay change since Kronos was initiated. Yet, Grievants did not file their claims until January 24, 2018, long after the statutory fifteen days had passed.

Grievants’ main argument is that they have been subject to salary disparity because of the changed compensation method. Grievant relies heavily on the Supreme Court decision in *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (1995).

At syllabus point 2 in *Martin, supra*, the West Virginia Supreme Court of Appeals held:

Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred.

Id. Justice Cleckley, writing for the Court, cited their prior decision in the Human Rights Commission case of *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W. Va. 525, 534, 383 S.E.2d 490, 499 (1989) wherein they recognize the concept of a continuing violation. Justice Cleckley noted that, “Although that opinion was decided under the Human Rights Act, W. Va. Code, 5-11-1, et seq. (1967), we see no reason not to apply the same analysis to W. Va. Code, 18-29-2 (1992).”⁶ *Martin, supra*.

The court also wrote:

A plaintiff can establish a *prima facie* case of intentional salary discrimination if she proves that she is a member of a protected class and that she receives a lower salary than an individual who is not a member of the plaintiff's class and who is similarly situated to the plaintiff in terms of experience and the comparability of job content.

Id., Syl. Pt. 3.

Martin, supra, establishes that an essential element of salary disparity is that Grievants are being paid differently than others to whom they are similarly situated. That is not the case in this instance. Prior to the payroll change, all employees were paid twenty

⁶ W. VA. CODE § 18-29 1 et seq. was replaced by W. VA. CODE § 6C-2-1 et seq. which applies to all public employees instead of being exclusive education employees like the precursor statute.

percent of their hourly wage for on-call time. After the payroll change all employees are paid a fixed rate for their on-call time. While the method of pay was changed, it was changed for all employees and Grievants were not treated differently. Consequently, there is no salary disparity which would create a continuing grievance. Instead there was a single event which has a lasting impact upon all employees, and Grievants did not file their claims within fifteen working days of that event. Accordingly, the consolidated grievances are DISMISSED.

Conclusions of Law

1. When an employer seeks dismissal of a grievance on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance to be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-

060 (July 16, 1997), *aff'd*, *Circuit Court of Kanawha County*, No. 97-AA-110 (Jan. 21, 1999).

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WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1).

4. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). See *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

5. Respondent proved that Grievants did not file their claims within fifteen days of the event which gave rise to their grievances.

6. Grievants argued that they were subjected to pay disparity which was a continuing practice allowing them to file their grievances “within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance.”

7. An essential element of salary disparity is that Grievants are being paid differently than others to whom they are similarly situated. *See, Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (1995).

8. Grievant did not prove that any employees were compensated differently for on-call time.

Accordingly, the consolidated grievances are DISMISSED.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: May 9, 2018

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**